Khairuddin bin Hassan v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO M-05–27 OF 2004
LOW HOP BING, HASAN LAH AND SULAIMAN DAUD JJCA
16 NOVEMBER 2009

B

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — Possession — Whether elements of custody, control and knowledge established — Whether conduct of accused in running away when approached by police inferred knowledge of impugned drugs

C

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — Possession established without aid of presumption under s 37(d) — Whether presumption of trafficking under s 37(da)(vi) applicable — Dangerous Drugs Act 1952 ss 37(d), (da)(vi) & 39B(1)(a)

D

E

Criminal Procedure — Defence — Court, duty of — Conflicting versions of evidence — Whether trial court free to accept one version and to reject another based on audio visual advantage at trial

F

Evidence — Information leading to fact discovered — Admissibility of statement — Whether voluntariness a condition precedent — Whether court has discretion to exclude information given involuntarily — Whether circumstances of involuntariness ought to be extraordinary to exclude such information — Evidence Act 1950 s 27

G

Evidence — Information leading to fact discovered — Principles applicable — Information taken down in writing by police officer — No violence or force used to extract information from accused — Information related to concealment of contraband and accused's knowledge of such concealment — Information not previously known to police — Whether admissible as evidence — Evidence Act 1950 s 27

H

I

Two police officers, PW4 and PW8, acting on information received, were keeping surveillance when PW4 observed a car driven by DW2 with the appellant as the front passenger. PW4 followed their car and blocked it. When DW1 and the appellant got out of their car, PW4 shouted 'police', which caused both DW2 and the appellant to flee. However, they were both

apprehended and brought back to the car. A question and answer session then ensued between PW4 and the appellant. The appellant gave information that he had 3kg of ganja kept near his feet in the car. The appellant led PW4 to the front door on the left side of the car and pointed to a tied black plastic bag at the foot well of the front passenger seat next to the driver. Inside the bag were three transparent plastic bags containing some substance later confirmed to be 2660g of cannabis. PW4 recorded his questions and the appellant's answers in his note book. The appellant and DW2 were charged with trafficking 2660g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the case for the prosecution, the trial judge ordered the appellant to enter his defence but acquitted and discharged DW2. The appellant gave a statement from the dock and his defence was totally opposite to the prosecution's version of things. The trial judge admitted the information given by the appellant to PW4 under s 27 of the Evidence Act 1950 ('s 27 information'). The judge also found that the appellant's conduct in running away gave rise to an inference that he had prior knowledge of the existence of the dangerous drugs. At the close of the defence case, the trial judge rejected the appellant's defence, convicted and sentenced him to death. The appellant appealed to the Court of Appeal. On appeal, appellant's counsel submitted that: (i) the trial judge had wrongly admitted the s 27 information, as the police had used force on the accused; and (ii) the appellant's conduct did not demonstrate his knowledge in relation to the drugs found at the foot well of the driver's seat in the car and so there was insufficient evidence of possession.

Held, dismissing the appeal:

(1) Voluntariness is not a condition precedent for the admission of a s 27 information. A s 27 information found to be involuntary may be excluded by the court in the exercise of its discretion. The exercise of such discretion depends on the facts and circumstances of each particular case. The accused, being the party seeking to have the s 27 information excluded, bears the onus of showing, on a balance of probabilities that the discretion should be exercised in his favour. The circumstances of involuntariness must be extraordinary to exclude the s 27 information, which in the first place does not affect its admissibility (see paras 17–18); *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389 referred; *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 referred.

(2) Due to the conflicting versions given by the prosecution and the defence at the trial, it was necessary for the trial judge to accept one version and reject the other, based on the audio visual advantage he had at the trial. In the instant case, there was no error in his approach in accepting the prosecution's version and rejecting the defence version (see para 20).

(3) In the instant case, no force had been used on the accused. The discovery of the drugs was the direct cause of the s 27 information which related distinctly to the place of concealment of the drugs under the appellant's seat on the left of the driver and the appellant's knowledge of it. This information the police had not previously learnt from other sources. The knowledge of the fact was first derived from information supplied by the accused. The information supplied by the accused was thus admissible and the trial judge had correctly admitted the same (see paras 22–23); *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 (FC) distinguished.

(4) The trial judge had correctly found that the appellant was in custody and control of the bag containing the drugs. The appellant's act of attempting to run away clearly had a nexus to the fact in issue and gave rise to an inference that he had the knowledge that the bag contained drugs. It was for the appellant and not the court to explain his conduct (see para 31).

(5) In the instant appeal, all the evidence adduced at the trial clearly gave rise to an inescapable inference that the accused had 'means rea possession' of the packages containing the drugs. All the evidence gave rise to a strong inference that the accused was in possession with knowledge of the contents of the packages. Since the prosecution had established the element of actual possession and knowledge without the aid of the presumption under s 37(d), the presumption of trafficking under s 37(da)(vi) was applicable as the weight of the cannabis (2660g) in respect of the charge was more than the statutory trigger of 200g (see paras 38–39).

[Bahasa Malaysia summary

Dua orang pegawai polis, PW4 dan PW8, bertindak atas maklumat yang diterima, sedang membuat pengawasan apabila PW4 mendapati sebuah kereta yang dipandu oleh DW2 bersama perayu yang duduk di hadapan tempat duduk penumpang. PW4 mengekori kereta tersebut dan kemudian menghalangnya. Apabila DW1 dan perayu keluar dari kereta tersebut, PW4 menjerit, 'polis' dan kedua-dua DW2 dan perayu melarikan diri. Walau bagaimanapun, kedua-duanya berjaya diberkas dan dibawa ke kereta. Suatu sesi soal jawab berlaku antara PW4 dan perayu. Perayu memberikan maklumat bahawa dia memiliki 3kg ganja yang disimpan berdekatan kakinya di dalam kereta tersebut. Perayu kemudian membawa PW4 ke pintu hadapan bahagian kiri kereta tersebut dan menunjuk ke arah sebuah beg plastik hitam di bahagian kaki tempat duduk penumpang hadapan sebelah tempat duduk pemandu. Dalam beg tersebut terdapat tiga plastik beg lut sinar mengandungi sejenis bahan yang kemudiannya disahkan sebagai 2660gm kanabis. PW4 merekodkan soalan-soalannya dan jawapan-jawapan perayu dalam buku notanya. Perayu dan DW2 dituduh mengedar 2660gm kanabis

di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pada penutup kes pendakwaan, hakim bicara mengarahkan perayu membela diri tetapi melepaskan dan membebaskan DW2. Perayu memberi keterangan dari kandang orang salah dan pembelaannya sangat berlawanan dengan cerita pihak pendakwaan. Hakim bicara menerima maklumat yang diberikan perayu kepada PW4 di bawah s 27 Akta Keterangan 1950 ('maklumat s 27'). Hakim juga mendapati bahawa tindakan perayu yang melarikan diri membangkitkan anggapan bahawa dia mengetahui kewujudan dadah berbahaya tersebut. Pada penutup kes pembelaan, hakim bicara menolak pembelaan perayu, mensabit dan menghukumnya dengan hukuman mati. Perayu merayu ke Mahkamah Rayuan. Semasa rayuan, peguam perayu menghujah bahawa: (i) hakim bicara telah salah memasukkan keterangan s 27 tersebut, kerana pihak polis menggunakan kekerasan terhadap tertuduh; dan (ii) tindakan perayu tidak menunjukkan pengetahuannya terhadap dadah yang dijumpai di kaki di tempat duduk pemandu dalam kereta tersebut dan oleh itu, keterangan bagi milikan tidak mencukupi.

Diputuskan, menolak rayuan:

(1) Sukarela bukanlah syarat duluan bagi kebolehterimaan maklumat s 27. Maklumat s 27 yang didapati diberikan secara paksa boleh dikecualikan oleh mahkamah atas budi bicaranya. Perlaksanaan kuasa budi bicara tersebut bergantung ke atas fakta-fakta dan keadaan setiap kes. Tertuduh yang merupakan pihak yang menghendaki maklumat s 27 tersebut dikecualikan memikul beban membuktikan, atas imbangan kebarangkalian, bahawa budi bicara tersebut harus dilaksanakan memihak kepadanya. Keadaan tidak rela haruslah luar biasa untuk mengecualikan maklumat s 27 tersebut, yang mana sebenarnya tidak menggugat kebolehterimaannya (lihat perenggan 17–18); *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389 dirujuk; *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 dirujuk.

(2) Berikutan cerita yang bercanggah yang diberikan oleh pihak pendakwaan dan pembelaan semasa perbicaraan, adalah perlu bagi hakim bicara menerima satu versi dan menolak versi yang lain, berdasarkan kelebihan pandang dengar semasa perbicaraan. Dalam kes ini, tiada kesilapan dalam pendekatannya dalam menerima versi pendakwaan dan menolak versi pembelaan (lihat perenggan 20).

(3) Dalam kes ini, tiada kekerasan dilakukan terhadap tertuduh. Penemuan dadah tersebut merupakan kesan langsung maklumat s 27 yang jelas berkaitan tempat persembunyian dadah tersebut di bawah tempat duduk perayu di sebelah kiri pemandu dan juga pengetahuan perayu tentangnya. Pihak polis tidak mengetahui maklumat ini daripada sumber lain. Pengetahuan tentang fakta tersebut didapati daripada

maklumat yang diberikan oleh tertuduh. Maklumat yang diberikan oleh tertuduh oleh itu boleh diterima dan hakim bicara telah memasukkan keterangan tersebut dengan tepat (lihat perenggan 22–23); *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 MP dibeza.

(4) Hakim bicara dengan tepat telah mendapati perayu menyimpan dan mengawal beg yang mengandungi dadah tersebut. Tingkah laku perayu yang cuba melarikan diri jelas berkait dengan fakta yang menjadi persoalan dan membangkitkan inferens bahawa dia sedia maklum bahawa beg tersebut mengandungi dadah. Perayulah yang harus menjelaskan perilakunya dan bukannya mahkamah (lihat perenggan 31).

(5) Dalam rayuan ini, kesemua keterangan yang dikemukakan semasa perbicaraan jelas menimbulkan inferens yang tidak dapat disangkal bahawa tertuduh mempunyai 'milikan mens rea' bungkusan-bungkusan berisi dadah tersebut. Kesemua keterangan membangkitkan inferens kukuh bahawa tertuduh memiliki dengan pengetahuan akan isi bungkusan-bungkusan tersebut. Oleh sebab pihak pendakwaan telah membuktikan elemen milikan sebenar dan pengetahuan tanpa bantuan anggapan di bawah s 37(d), anggapan mengedar di bawah s 37(da)(vi) terpakai kerana berat kanabis tersebut (2660g) berikutan tuduhan tersebut adalah melebihi berat pencetus statutori 200g (lihat perenggan 38–39).]

Notes

For cases on admissibility of statement, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1900–1909.

For cases on court, duty of, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1695–1709.

For cases on principles applicable, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1928–1933.

For cases on s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 590–593.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1, SC (refd)

Chan Pean Leon v PP [1956] MLJ 237, HC (refd)

Chong Soon Koy v PP [1977] 2 MLJ 78, FC (refd)

Director of Public Prosecutions v Brooks (Wishart) [1974] 2 All ER 840, PC (refd)

Francis Antonysamy v PP [2005] 3 MLJ 389; [2005] 2 CLJ 481, FC (refd)

Goi Ching Ang v PP [1999] 1 MLJ 507, FC (distd)

Leow Nghee Lim v Reg [1956] MLJ 28, HC (refd)

Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)

A *PP v Abdul Rahman bin Akif* [2007] 5 MLJ 1, FC (refd)
PP v Chin Moi Moi [1995] 1 SLR 297, HC (refd)
PP v Foo Jua Eng [1966] 1 MLJ 197, HC (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401, HC (refd)
San Soo Ha v PP [1968] 1 MLJ 34, HC (refd)
B *Surentheran a/l Selvaraja v PP* [2006] 1 MLJ 641; [2005] 2 CLJ 264, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da)(vi), 39B(1)(a), (2)
C Evidence Act 1950 ss 24, 27

Appeal from: Criminal Trial No 45–3 of 2001 (High Court, Malacca)

Karpal Singh (Ramkarpal Singh with him) (Karpal Singh & Co) for the appellant.
D *How May Ling (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Low Hop Bing JCA:

E APPEAL

[1] Together with another person, the appellant ('the accused') was charged with the offence of trafficking 2660g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the same Act
F (for brevity and convenience, a reference to a section hereinafter is a reference to that section in the Dangerous Drugs Act 1952 unless the context otherwise requires).

G **[2]** At the close of the case for the prosecution, the learned trial judge ordered the accused to enter his defence on the trafficking charge. The other person ('the driver') was acquitted and discharged, on the ground that no prima facie case has been established.

H **[3]** At the close of the defence case, the accused was convicted and sentenced to death. Hence, this appeal by the accused.

[4] On 11 August 2009, we dismissed the appeal. We now give our grounds.

I

CASE FOR THE PROSECUTION

[5] At the close of the case for the prosecution, the narrative of the trial judge's finding of facts may be unfolded as follows.

[6] On 7 August 2001, at about 11pm, Chief Inspector Mohd Fared bin Abdul Aziz ('PW4') and Detective Corporal Abdul Razak bin Majid ('PW8'), acting on information received, were on surveillance in the area near Flat Sri Siantan Melaka. PW4 saw a Citroen car bearing registration No BDX 6007 ('the Citreon car'). There were two persons in the Citreon car vis the driver, and next to the driver was the passenger who was the accused.

[7] PW4 followed the Citreon car for about 20 minutes until it stopped at the car park of Pusat Rawatan Al-Baqarah nearby. PW4 used his car to block the Citreon car at the rear. The driver and the accused opened their car doors respectively. PW4 then shouted 'police'. The driver fled to his right, while the accused ran to his left. Both of them were later apprehended about 25 feet away and brought back to the Citreon car. A question and answer session ensued between PW4 and the accused. PW4 recorded his questions and the accused's answers in his note book. Pursuant to the question and answer session, the accused gave the information that he (the accused) kept 3kg of ganja near his feet under the accused's seat, on the left of the driver. This information, recorded by PW4 in his note book, was tendered as exh P21A. The learned trial judge admitted the information under s 27 of the Evidence Act 1950 ('s 27 information').

[8] The accused led PW4 to the front door on the left side of the car and pointed to a black plastic package tied in a knot at the top ('exh P8') situated at the foot well of the passenger seat next to the driver. Inside the bag were three transparent plastic bags ('exhs P10, P13 and P16'). Inside each of the plastic bags respectively was a slab of cannabis wrapped in transparent plastic. The drugs, as analysed by the chemist ('PW2'), contain 2660g of cannabis.

[9] A cautioned statement, recorded from the accused on 12 August 2001, also contained the s 27 information. The cautioned statement was admitted as exh P38, after a trial within a trial.

THE DEFENCE CASE

[10] The accused's statement from the dock was tendered and marked as exh D40. The accused stated that he travelled with the driver to Melaka to collect a debt from a friend. When he boarded the Citreon car, there was nothing on the passenger seat or on the floor. He denied running away when the police accosted him, and the police never introduced themselves. He added that the black plastic bag was recovered from the car boot and was planted by the police at the foot well of the passenger seat. He denied pointing out the drugs to the police. He also denied giving a cautioned statement to the police on 12 August 2001.

[11] The accused called one Zahurim as DW1 and the driver as DW2. DW1 testified that he borrowed the Citreon car at about noon that day. DW1 met with a person named Man who asked DW1 to deliver the black plastic bag to one Ganesh at 9pm. Man told DW1 that the black plastic bag contained *rokok keretek* Gudang Garam (cloves cigarettes). Man placed the bag in the car boot, and gave Ganesh's telephone number to DW1 for DW1 to contact and meet Ganesh who would give DW1 RM100 as the fee when Ganesh received the black plastic bag. DW1 then went home to sleep.

[12] DW2 testified that when he went to DW1's house at about 7pm to take the Citreon car, DW1 had forgotten about the black plastic bag in the boot, and only informed DW2 later of his (DW1's) meeting with Man. DW2 said that when he took the car from DW1 in order to accompany the accused to Melaka, there was nothing on the passenger seat or on the foot well, and that the police who had opened the car door apprehended him immediately.

SECTION 27 INFORMATION

[13] Learned defence counsel Mr Karpal Singh (assisted by Mr Ramkarpal Singh) submitted that the learned trial judge had wrongly admitted the s 27 information, as the police had used force on the accused. They cited *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 (FC) in support thereof.

[14] Ms How May Ling, learned deputy public prosecutor, subscribed to the view that the s 27 information has been rightly admitted by the learned trial judge.

[15] Section 27 merits reproduction as follows:

> When *any fact* is deposed to as *discovered* in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether such information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. (Emphasis added.)

[16] Section 27 has been judicially considered in a long line of authorities. Illustrations include:

(a) *San Soo Ha v Public Prosecutor* [1968] 1 MLJ 34 at p 35B–C rt where Raja Azlan Shah J (as HRH then was) applied the established law that such words as 'I have concealed', 'I have hidden', 'I have kept' are admissible in evidence under s 27;

(b) *Chong Soon Koy v Public Prosecutor* [1977] 2 MLJ 78 at p 79C–F (FC) where Suffian LP (as he then was) spoke for the Federal Court and explained that under s 27, 'the fact discovered' embraces the place from

which the pistol and ammunition were produced and the knowledge of the accused as to this. His Lordship highlighted that the 'information' supplied by the accused 'relating distinctly to the fact thereby discovered' was 'information with regard to a firearm and the ammunition which he had hidden in the Berapit Hills in Bukit Mertajam'. All that evidence was held admissible under s 27;

(c) *Public Prosecutor v Chin Moi Moi* [1995] 1 SLR 297 (HC), Yong Pung How CJ (Singapore) held that the words 'whether such information amounts to a confession or not' clearly indicate that 'information' is not only limited to a statement by the accused but also acts or conduct of the accused which relate distinctly to the fact discovered including acts like pointing out the place where an article is hidden or where the accused leads the police to that article; and

(d) *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481 where the Federal Court through the judgment of Augustine Paul JCA (now FCJ) at p 403 (MLJ); p 498 paras d and h (CLJ) held that s 27 is independent and is not subject to the voluntariness rule in s 24 of the Evidence Act 1950 or for that matter any other statutory provision regulating the manner of taking or recording statements from any person. His Lordship emphasised that this is illustrated by the established rule that information relating to facts discovered in consequence of a confession rendered inadmissible by reason of being involuntary is still admissible under s 27.

[17] It is abundantly clear to us that as a general rule, the issue of voluntariness is not a condition precedent for the admission of a s 27 information.

[18] Be that as it may, by way of an exception, we are mindful of the principle that a s 27 information which has been found to be involuntary may be excluded by the court in the exercise of its discretion, the exercise of which must depend on the facts and circumstances of each particular case. The accused being the party seeking to have the s 27 information excluded in the exercise of the discretion bears the onus of showing, on a balance of probabilities, that the discretion should be exercised in his favour. The circumstances of involuntariness must indeed be extraordinary in order to exclude the s 27 information which in the first place does not affect its admissibility in law: see *Francis Antonysamy* at pp 404–405 (MLJ); pp 499d and 501f (CLJ), applying *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 (HC).

[19] On the issue of the use of force on the accused, the learned trial judge had rejected the accused's evidence that he was kicked and punched by the police, as the place of arrest was a public place.

[20] We are of the view that the conflicting versions given by the prosecution and the defence at the trial make it necessary for the learned trial judge, for good reasons, to accept one version and reject the other, based on the audio visual advantage he had at the trial. We are unable to identify any error in his approach in accepting the version of the prosecution and rejecting the defence's version.

Goi Ching Ang, on which the defence relies, is readily distinguishable on the facts in that one or two days after the accused was arrested, he was blindfolded and brought together with another person to his rented house. After the blindfold was taken off, he saw laying out on the floor of the sitting room pistols and ammunition which he denied ever telling PW5, a senior police officer, that he had agreed to show PW5 where he kept them, and that he had no knowledge of the firearms and the ammunition seized from the house. The Federal Court speaking through Chong Siew Fai CJ (Sabah and Sarawak) (as he then was) exercised the discretion to exclude the s 27 information.

[21] In the instant appeal, as alluded to above, the learned trial judge has arrived at a specific finding of facts that the police had not used any force on the accused. The s 27 information has led to the discovery of the drugs. The discovery was the direct cause of the information which relates distinctly to the place of concealment of the cannabis under the accused's seat on the left of the driver and the accused's knowledge of it. The admissible information is the accused's information which relates to the exact location of the cannabis and its subsequent discovery. The information supplied by the accused which led to the discovery of the cannabis is the information which the police had not previously learnt from other sources and the knowledge of the fact was first derived from information supplied by the accused. The cause of the discovery was the information supplied by the accused and not the prior knowledge of the police. Hence the information supplied by the accused is admissible as the information that the police had no prior knowledge: *Francis Antonysamy* at p 407 (MLJ); p 503 (CLJ) (FC).

[22] In our view, the learned trial judge was correct in admitting the s 27 information.

CONDUCT OF THE ACCUSED

[23] It was argued for the defence that the conduct of the accused does not

demonstrate the accused's knowledge in relation to the thing found at the foot well of the driver's seat in the car and so there was no sufficient evidence of possession.

[24] The prosecution contended that actual possession had been established against the accused and that the weight of cannabis being in excess of 200g, the presumption of trafficking under s 37(da)(vi) is triggered.

[25] The learned trial judge specifically found that there was mens rea possession, even without resorting to the s 27 information. The learned trial judge said: 'the conduct of the accused in attempting to run away even before the discovery of the drugs when approached by PW4 clearly gives rise to an inference that he had prior knowledge of the existence of the drugs.'

[26] The above factual background is strikingly similar to the factual situation in *Director of Public Prosecutions v Brooks (Wishart)* [1974] 2 All ER 840 (PC). This is the advice of the Privy Council after hearing an appeal from the Court of Appeal of Jamaica. The concise facts and decision appear in the head note. They merit reproduction as follows:

> Some police officers saw a van parked, with its engine running, in a lay-by at Braco, Jamaica. The respondent was occupying the driver's seat and there were several other people in the cab. When the officers hurried towards the van, the occupants scrambled out and ran off. The respondent was caught by the officers. Inside the body of the van, which was neither visible nor accessible from the cab itself, the police found 19 sacks containing a total of more than 1,000lbs of ganja. When questioned by the officers, the respondent said that he had been employed by R and had been told to drive the van, loaded as it was, to Braco. When asked whether he knew what was in the sacks, the respondent made no reply. The respondent was charged with, and convicted of, unlawfully having in his possession ganja, contrary to s 7(c) of the Dangerous Drugs Law of Jamaica. He appealed to the Court of Appeal of Jamaica, which quashed the conviction on the ground that he, as R's servant, merely had custody of the van and the contents, and that was not enough to constitute 'possession'.
>
> Held — The appeal would be allowed and the conviction restored, for (i) a person had possession of a dangerous drug, within s 7(c), if, to his knowledge, he had the drug in his physical custody or under his physical control, and (ii) on the evidence the respondent had in his physical custody and control the 19 sacks of ganja and from the evidence it could be inferred that he knew what he was carrying in the van.

[27] On the other hand, we are mindful of the judgment of the Federal Court in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 pertaining to drug trafficking under s 39B(1)(a). There was evidence of possible access to the house by others. It was held that the conduct of the

A accused in running away was equally consistent with him having been in a state of pure panic even through he did not offer any explanation himself.

[28] The Federal Court judgment in *Abdullah Zawawi*, appears to be at variance with the Privy Council advice in *Brooks*, demonstrating two different
B judicial approaches.

[29] In *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 at p 45 (FC), Augustine Paul FCJ resolved these different approaches in the following passage:
C

> The difference in both the cases is that in *Abdullah Zawawi bin Yusoff* there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within the meaning of s 8 (of the Evidence Act 1950) in view of the possibility of access to the house by others. It is therefore not
> D admissible on this ground as it is equivocal thereby justifying inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi bin Yusoff* is therefore authority only to this extent. On the other hand in *Director of Public Prosecutions v Brooks (Wishart)* there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian
> E context, within the meaning of s 8. It is therefore admissible and cannot be explained away by the court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by s 9 (of the same Act). (Words in bracket added.)

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[30] Reverting to the mainstream in the instant appeal, in view of the learned trial judge's finding (and in our view, correctly) that the accused was in custody and control of exh P8 containing the drugs ie in physical possession of it, the fact in issue is whether he had knowledge that the bag
G contained the drugs. His act of attempting to run away clearly has a nexus to the fact in issue and gives rise to an inference that he had the knowledge that the black plastic bag contained drugs. It is for the accused to explain his conduct and not for the court to offer one.

H **[31]** The defence story that the accused had never tried to run had been rejected. The learned trial judge is entitled to do so. The learned trial judge's finding that the accused was in possession of the drugs in question is consistent with established authorities eg *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 at p 239 where Thomson J applied the description of
I 'possession' in *Stephen's Digest* (9th Ed) at p 304 as follows:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[32] His Lordship in *Chan Pean Leon* elaborated:

> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he sees any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found show such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed.
>
> Once possession is proved then before the accused person can be convicted it is necessary in addition to prove mens rea. Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. There may be something in the accused's behaviour that shows knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was' or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

[33] In *Leow Nghee Lim v Reg* [1956] MLJ 28 at p 30, Taylor J further explained as follows:

> ... The word 'possession' is the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons. The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge … (at p 31).

[34] In *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1 at p 10 para I (FC), the respondent was the only person in the car at the material time; the drugs were found hidden under the driver's seat and front passenger seat and the car was in possession of the respondent for more than seven months prior to his arrest. In the circumstances, the Federal Court drew the irresistible inference that the respondent all along knew about the drug in the car and that there was evidence of possession of the drug independent of s 37(d).

[35] In *Surentheran a/l Selvaraja v Public Prosecutor* [2006] 1 MLJ 641; [2005] 2 CLJ 264 at p 646 (MLJ); p 270 (CLJ), the Court of Appeal through the judgment of Abdul Aziz Mohamad JCA held that:

(a) it was not for the court at the close of the prosecution case, to provide a defence for the appellant and speculate on the probability that, for example, someone else had left the bag in the appellant's car without his knowledge; unless there were elements in the evidence of the prosecution case itself pointing to such probability, it must not be entertained; and

(b) the inescapable inference from the fact that the bag was so placed in relation to the appellant in the car as has been described can only be that he knew of the existence of the bag. From the fact that he allowed the bag to remain there while he was driving, the inescapable inference is that he willed the bag to be there in order to guard it and that therefore he was in custody and control of it.

[36] In *Public Prosecutor v Foo Jua Eng* [1966] 1 MLJ 197, Raja Azlan Shah J (as HRH then was) ruled that the conduct of the accused in trying to close the door on PW1 (police officer) and the physical proximity of the accused to the drugs proved the element of possession.

[37] We are of the view that in the instant appeal, all the evidence adduced at the trial clearly gave rise to an inescapable inference that the accused had 'means rea possession' of the packages containing the cannabis. All the evidence gave rise to a strong inference that the accused was in possession with knowledge of the contents of the packages. At this point, there was no evidence to suggest otherwise. The known facts support such an inference.

[38] As the prosecution had established the element of actual possession and knowledge without the aid of the presumption under s 37(d), the presumption of trafficking under s 37(da)(vi) is applicable as the weight of the cannabis (2660g) for the charge was more than the statutory trigger of 200g.

CONCLUSION

[39] The learned trial judge had carefully considered the evidence of the prosecution and the defence. We are unable to find any error on his part. In

the circumstances, the accused's appeal, being devoid of merits, is dismissed. We therefore affirmed the conviction and sentence imposed by the High Court.

Appeal dismissed.

Reported by Andrew Christopher Simon